Supreme Court, U.S.
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No. 92-20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1991

BARBARA R. WINER — PETITIONER

vs.

LAURENCE H. WINER and LINDA R. WINER — RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF OF PETITIONER BARBARA R. WINER TO BRIEF OF RESPONDENTS LAURENCE H. WINER and LINDA R. WINER IN OPPOSITION

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QUESTION PRESENTED

1) DID THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DEFRAUD THE PETITIONER OF HER RIGHTFUL ONE-THIRD (1/3) SHARE OF THE INHERITANCE FROM HER FATHER'S TRUST AND ESTATE, THEREBY DENYING HER DUE PROCESS OF LAW, WHEN IT REFUSED TO GRANT HER PETITION FOR FURTHER APPELLATE REVIEW?

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ARGUMENT

I.

THE FORMAT OF THE RESPONDENTS' BRIEF IN OPPOSITION IS FAULTY

The Respondents served their Brief in Opposition ("OPP.") to the Petitioner without (1) signing their OPP. or indicating that such was signed, and (2) without indicating who is their counsel of record. Thereby, the Respondents submitted their OPP. in violation of Federal Rules of Civil Procedure rule 11, and Rules of the Supreme Court rule 33.6. (See OPP. signature page attached hereto as Appendix "App." a. Also, note lack of designation of counsel of record on OPP. cover, App. c; See App. d(1)-(2) and e(1).

Said violations prejudice the Petitioner because (1) since a typewritten name on pleadings is not a signature for Rule 11 purposes, no one is subject to responsibility should she wish to request Rule 11 sanctions against the Respondents (See Giebelhaus v. Spindrift Yachts, 938 F.2d 962, 965, 966 (C.A. 9th 1991)), and (2) because the Petitioner cannot determine if Respondent Laurence, who is an attorney, is representing only himself or if he is representing Respondent Linda as well.

The Respondents also submitted their OPP. in violation of Supreme Court Rules 29.5 (c) by failing to serve the Petitioner with a **notarized** Certificate of Service, or to indicate thereon who is counsel of record for each party. (See App. b(1)-(2) and e(2).)

For the foregoing reasons, pursuant to Rules of the Supreme Court rule 33.7, this Court should impose sanctions against the Respondents. (See App. e(1).)

II.

THE RESPONDENTS WERE IN ERROR IN CLAIMING THAT THE UNITED STATES SUPREME COURT LACKS JURISDICTION OVER THIS CASE

A. THE RESPONDENTS WERE IN ERROR IN CLAIMING THAT THIS CASE INVOLVES SOLELY MATTERS OF STATE LAW

The Respondents support Barbara's claim that she is an equal one-third (1/3) beneficiary of their father's Trust and estate by acknowledging that they,

> "...early on offered to treat Barbara entirely equally with themselves and divide all Trust (and estate) net assets equally among three."
> (See OPP. pp. 2, 3; See Petition for Writ of Certiorari ("PET.") p. 60, Note "n." 3.)

However, Barbara stated facts and provided **documentary evidence** which clearly prove that any such offer made by the Respondents was fraudulent, as such was designed to defraud her out of her rightful one-third (1/3) share of the inheritance. (See PET., especially pp. 10, 14-16, 22-25 & App. W(1)-X(9).)

Nowhere in their OPP. did the Respondents factually controvert even one fact or object to even one piece of evidence of their fraud.[1]

Instead, the Respondents evaded direct discussion of said issue:

With regard to the estate, the Respondents merely implied that just because a Massachusetts Probate Court Judge (Manzi) approved their estate administration that such was proper. (See OPP. p. 3.)

With regard to the Trust, the Respondents merely offered general allegations to the effect that Barbara's claims are

> "...barred by clear principles of the Massachusetts law of trusts."
> (See OPP. p. 5.)

However, the Respondents failed to state even one Massachusetts law or to cite even one Massachusetts case to support their claim, or to counter the plethora of legal authority cited by Barbara whereby she clearly established her interest as an equal one-third (1/3) beneficiary of their father's Trust and estate. (See PET. especially pp. 27, 43-44, 62 n. 12 - 64 n. 13. See also p. 61 n. 4.)

Moreover, nowhere in their OPP. did the Respondents controvert Barbara's argument that their Motion for Summary

Judgment on their counterclaims should not have been allowed because their Affidavits in support of such were improperly submitted, and thus are legally ineffective. (See PET. pp. 35-36.)

Here, as throughout the State Court proceedings, the Respondents have never factually challenged or legally disputed the merits of Barbara's case.

Nevertheless, in an action repugnant to the United States Constitution, the Supreme Judicial Court of Massachusetts let stand as a source of Massachusetts law the arbitrary, unconstitutional adjudication of the Appeals Court which sanctioned the Respondents' wrongful behavior and denied Barbara **DUE PROCESS OF LAW**. (See PET. pp. 47-51.) Thereby, the Supreme Judicial Court affirmed the

abrogation of Barbara's **fundamental right.**[2]

It is clear that this case involves **Federal** constitutional issues and principles. (See PET. Section III pp. 4-5).

Inapplicable then to this case are the following authorities cited by the Respondents to support their claim that this case is not subject to review by the Supreme Court because such involves only non-federal matters: Webb v. Webb, 451 U.S. 493, 494 n. 1 (1981); McDonald v. Oregon Railroad & Navigation Co., 233 U.S. 665, 669-70 (1914), and Enterprise Irrigation District v. Farmer's Mutual Canal Co., 243 U.S. 157, 166 (1917).

Furthermore, Enterprise (supra.) at 164 makes it clear that the Supreme Court has jurisdiction over this case: Therein, the Court stated that where a

non-Federal issues is so interwoven with the Federal issue so as not to be an independent matter, and in cases where arbitrary adjudications are rendered... **as in the case here**... the U.S. Supreme Court's jurisdiction is plain.

B. THE RESPONDENTS WERE IN ERROR IN CLAIMING THAT THE STATE COURTS FAILED TO PASS ON THE FEDERAL QUESTION HEREIN PRESENTED FOR REVIEW

The Petitioner raised the Federal Question that she was denied **DUE PROCESS OF LAW** immediately after her Federal Constitutional rights were first abrogated by a Superior Court Judge (Flannery).

She continued to raise said issue at every stage of the proceedings throughout the State Court system so that each Court had an opportunity to correct the violations of her Federal rights.

In so doing, the Petitioner made direct reference to the Court records and the United States Constitution, and presented the Federal question in such a manner that the issue of **DUE PROCESS OF LAW** was made an issue of her case. Thus, the Federal Question was implicitly involved in each Court's adjudication(s).

Nowhere in their OPP. did the Respondents dispute even one fact whereby the Petitioner evidenced that she preserved her Federal claim for review by this Court.

Instead, noting that the State Courts failed to address the Federal Question, the Respondents implied that this was for want of presentation by citing authority whereby they claimed that (this)

> "Court would not consider substantive due process claim not raised below and which state courts did not address." (See OPP. pp. 6, 7.)

In the authorities cited by the Respondents, Webb (supra.) at 495, and Street v. New York, 394 U.S. 576, 582 (1969), the Court stated when,

> "...the highest state court has failed to pass upon a federal question it will be assumed that the omission was due to want of proper presentation in the state courts, **unless the aggrieved party in this Court can affirmatively show the contrary.**" (Emphasis)

It is clear that the Petitioner rebutted the assumption of want of proper presentation by proving, with undisputed facts, that she timely, properly and explicitly raised her Federal constitutional issue in the trial court, and in two appellate courts. (See PET.

pp. 31-33; 41-42; 47-48; 51; and p. 64 n. 14.)

This likens her case to Street (supra.) at 581-585 over which the Supreme Court assumed jurisdiction after deciding that the Appellant raised his Federal constitutional issue in the trial court, and in two appellate courts.[3]

III.

THE RESPONDENTS WERE IN ERROR IN CLAIMING THAT THIS CASE DOES NOT CONCERN MATTERS AFFECTING THE INTERESTS OF JUSTICE OR THE INTERESTS OF THE GENERAL PUBLIC

Rules of the Supreme Court rule 10.1 provides in part,

> "A petition for a writ of certiorari **will** be granted only when there are special and important reasons therefor." (Emphasis) (See PET. p. 57-58 and Supreme Court Rule 10.1 (c), App e(3).)

Special and important reasons imply that the settlement of a case involves

constitutional issues and principles of importance to the public. (See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955) and Layne v. Bowler Corp. v. Western Well Works, Inc. 261 U.S. 387, 393 (1923).)

Any reasonable, unbiased person familiar with the facts of this case would undoubtedly recognize that the Supreme Judicial Court of Massachusetts flagrantly violated the United States Constitution when, **for no legitimate state compelling reason**, it invidiously discriminated against the Petitioner and sanctioned the fraud of the Respondents and other "Officers of the Court" toward her in the inheritance from her father's Trust and estate.

Thus, this case is of **fundamental** importance to **all** Americans because it concerns the **fundamental** issue of **the**

protection of the individual against arbitrary action of government.

The facts of this case clearly demonstrate:

1) This case concerns the Federal claim that the Petitioner was denied **DUE PROCESS OF LAW**;

2) The Petitioner timely and properly preserved her Federal claim for review by this court;

3) The merits of the Petitioner's claim have never been factually or legally controverted; and

4) This case is of **fundamental** importance to <u>all</u> Americans.

It is clear that this case is within the jurisdiction of the United States Supreme Court.

CONCLUSION

Wherefore, in the interests of justice to both the Petitioner and the general public, the United States Supreme Court must exercise its judicial discretion to grant the Petition for (a) Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

THE PETITIONER IN PRO SE

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P.O. Box 122
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ENDNOTES

[1]When a prima facie case of liability has been shown against a Defendant, the Defendant has the burden of introducing evidence to rebut it. His failure to present evidence within his control to deny facts adverse to his interest warrants the inference that those facts are true and may be found to be an admission by silence. (See Tardie v. Condon, 22 Mass. App. Dec. 202-204, 205, (1961) and Giannusa v. First National Stores, Inc., 55 Mass. App. Dec. 108, 109, 113 (1974).)

[2]Citing Ford v. Flaherty, 364 Mass. 382, 387-88 (1973) the Respondents claim "Denial of further appellate review in Massachusetts is not a decision on the merits." (See OPP. p. 5 n. 1.)

The Petitioner maintains that the circumstances of her case render the Court's denial of her Petition for such review an affirmation of the adjudication by the Appeals Court on the legal and constitutional issues involved.

In the same footnote, the Respondents state that the Petitioner should have designated her PET. to the Massachusetts Appeals Court. They also stated, "See Faretta v. California 422 U.S. 806, 812 (1975)."

The Petitioner references Supreme Court Rule 10.1(b) to dispute this claim. (See App. e(3).)

The Petitioner also states that Faretta at 806, 812 is not relevant here.

[3]The Respondents' cited authority Yee v. City of Escondido, 112 S.Ct. 1522, 1531 (1992) is unlike this case because the Yees had not raised the due process part of their claim in the state courts. Thus, after granting certiorari to the Yees, the Supreme Court would not consider said part of their claim.

awarding Laurence summary judgment on his counterclaims based on applicable Massachusetts law and the uncontested facts before that court. The Massachusetts Appeals Court carefully reviewed the entire record before it and found nothing that could be construed even liberally to support Barbara's position. (Pet. at App. L. (7)-(8)). As that court said, "[T]he rules bind a pro se litigant as they bind other litigants." (Pet. at App. L. (10), *quoting Mmoe v. Commonwealth*, 393 Mass. 617, 620 (1985)). The Appeals Court nevertheless interpreted a Massachusetts statute to bar one of Laurence's counterclaims thereby requiring a redetermination of damages, but otherwise affirmed the trial court on procedural and substantive grounds. Barbara received full, fair and impartial treatment by the Massachusetts courts. Nothing suggests otherwise, and there is no reason to grant certiorari.

CONCLUSION

Fot the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 23, 1992

BEST AVAILABLE COPY

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BARBARA R. WINER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 92-20
	)	
LAURENCE H. WINER,	)	
LINDA R. WINER,	)	
	)	
Respondents.	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

This is to certify that today, July 23, 1992, I delivered (mailed), in quantities itemized, copies of the Brief Of Respondents Laurence H. Winer and Linda R. Winer In Opposition (1 volume) in the above-entitled matter to the following counsel of record:

(file 40 copies)
(FILED BY HAND DELIVERY)

b(1)

3 copies to:
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(MAILED FIRST CLASS)

Remaining copies to:
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By: Roger Thiel

Subscribed to and sworn before me this _____ day of _____, 19_____
_____ Notary Public.
My commission expires: _____

NOTE: THIS WAS NOT NOTARIZED.

b(2)

No. 92-20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BARBARA WINER,

Petitioner,

v.

LAURENCE H. WINER, LINDA R. WINER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF RESPONDENTS LAURENCE H. WINER and LINDA R. WINER IN OPPOSITION

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July 23, 1992

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C

FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions and Other Papers, Sanctions provides in pertinent part:

Every pleading, motion, an other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address... The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessarily delay or needless increase in the cost of litigation. **If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly**

after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (Emphasis)

RULES OF THE SUPREME COURT

Rule 33

PRINTING REQUIREMENTS

Rule 33.6 provides in pertinent part:

> The body of every document at its close **shall bear the name of counsel of record** and such other counsel, identified on the cover of the document... One copy of every motion or application... must in addition **be signed by counsel of record at the end thereof.** (Emphasis)

Rule 33.7 provides in pertinent part:

> ...If the Court finds that the provisions of this rule have not been adhered to, **it may impose, in its discretion, appropriate sanctions** including but not limited to dismissal of the action, imposition of costs, or disciplinary sanctions upon counsel.

Rule 29

FILING AND SERVICE OF DOCUMENTS SPECIAL NOTIFICATIONS

Rule 29.5 provides in pertinent part:

Proof of service, when required by these Rules, must accompany the document when it is presented to the Clerk for filing and must be separate from it. Proof of service may be shown by any one of the methods set forth below, and must contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of **counsel indicating the name of the party or parties each counsel represents...**

(c) By a **notarized** affidavit or declaration in compliance with 28 U.S.C. S 1746, reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of this Rule, **whenever service is made by any person not a member of the Bar of this Court**. (Emphasis)

Rule 10

CONSIDERATION GOVERNING REVIEW ON WRIT OF CERTIORARI

Rule 10.1(b) and (c) provide in pertinent part:

1. A review on writ of certiorari is not a matter of right, but a judicial discretion. **A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.** The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(b) When a **state court of last resort** has decided a federal question in such a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, **or has decided a federal question in a way that conflicts with applicable decisions of this Court.** (Emphasis)